

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

RODERICK HERBERT,

No. C 06-05532 SBA

Plaintiff,

ORDER

v.

[Docket No. 63]

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY and DOES 1-20, inclusive,

Defendants.

Before the Court is defendant State Farm Mutual Automobile Insurance Co.'s Motion for Summary Judgment or in the alternative, Motion for Summary Adjudication [Docket No. 63]. After reading and considering the papers presented, and the argument of counsel at the hearing hereon, held on February 5, 2008, the Court finds plaintiff Roderick Herbert made material representations regarding his criminal history, during State Farm's investigation of his claim for motorcycle theft, and thus GRANTS the motion.

BACKGROUND¹

Herbert is a citizen and resident of California. Defendant State Farm is a corporation with its principal place of business in Illinois. The Court has diversity jurisdiction under 28 U.S.C. § 1332(a).²

A. Herbert's Motorcycle Insurance Policy

Herbert purchased an insurance policy from State Farm on or about February 5, 2002, for his 2002 Harley Davidson Road King motorcycle. *See* Decl. of Pl. Robert Herbert in Opp'n to Mot. for

¹ The parties presented many additional facts in their pleadings, beyond those discussed in this Order. The Court largely limits its analysis here to Herbert's criminal history, though it provides his vehicle loss history for context.

² Herbert filed in Alameda County Superior Court, alleging California common law actions, which were removed by State Farm. Def.'s Notice of Removal, Ex. "A," at 1 (Pl.'s Compl.) [Docket No. 1]. Thus California provides the substantive law in this matter. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

1 Summ. J. or alternatively Mot. for Summ. Adjudication (“Herbert Decl.”), ¶¶ 4-5 [Docket No. 71].
2 The policy covered theft-related losses. Def.’s Notice of Removal, Ex. “A,” ¶ 6 (Pl.’s Compl.)
3 [Docket No. 1]. It included a concealment or fraud clause, which read, “[t]here is no coverage under
4 this policy if you or any other person insured under the policy has made false statements with the
5 intent to conceal or misrepresent any material fact or circumstance in connection with any claim
6 under this policy.” See Decl. of Toni Forrester in Supp. of Mot. for Summ. J., or in the alternative,
7 Mot. for Sum. Adjudication (“Forrester Decl.”), Ex. “B,” ¶ 7 [Docket No. 66].

8 **B. Herbert’s Insurance Claim**

9 On December 7, 2004, Herbert rode his motorcycle to work. Herbert Decl., ¶ 10. Then
10 around 6:30 P.M., he rode it to the Le Cheval restaurant, in Oakland, for dinner, and parked in its
11 parking lot. *Id.* After dinner, when he returned to the parking lot, his motorcycle was missing. *Id.*,
12 ¶ 11. Herbert called the Oakland Police Department and filed a report. *Id.*; Decl. of David
13 McDowell in Supp. of Mot. for Summ. J., or in the alternative, Mot. for Summ. Adjudication
14 (“McDowell Decl.”), Ex. “L” [Docket No. 67].

15 The next day, Herbert reported the theft to State Farm. See Forrester Decl., ¶ 7. The
16 following day, State Farm sent him a letter acknowledging the claim and asking him to complete an
17 Affidavit of Vehicle Theft (the “Affidavit”). *Id.*, ¶ 8. In the Affidavit, Herbert said the motorcycle
18 was worth \$44,000, as it was in “excellent” condition and had an imported seat, wheels, bags, and
19 lights, all custom designed. *Id.*, Ex. “C”; McDowell Decl., Ex. “O” at 2. He had purchased it for
20 about \$23,000 in 2002. Herbert Decl., ¶ 4.

21 **C. State Farm’s Investigation**

22 **1. Affidavit of Vehicle Theft**

23 On or about January 5, 2005, Herbert sent the Affidavit to State Farm. See Forrester Decl.
24 at 2. The Affidavit, *inter alia*, posited the following two questions: (1) “Has Vehicle been damaged
25 during the past three years?” Forrester Decl., Ex. “C” at 1. And, (2) “Any other claims in the last
26 three years on this or any other vehicle?” *Id.* In response to both, Herbert checked the “no” boxes.

1 *Id.* State Farm referred the claim to its Special Investigation Unit (“SIU”). *Id.*, ¶ 10.

2 **2. Claims Representative Forrester’s Telephone Interview**

3 On January 11, 2005, State Farm SIU Claim Representative Toni Forrester took Herbert’s
4 recorded statement over the telephone. *Id.*, ¶ 11. During the call, she asked Herbert if he had ever
5 had a vehicle stolen before. He said a Navigator had been stolen several years ago, but had been
6 recovered after being vandalized a little bit. *Id.*, Ex. “D” at 5-6. She also asked Herbert if he had
7 ever been charged or convicted of a misdemeanor or felony. *Id.* at 7. He said, “A long time ago.”
8 *Id.* at 7. Forrester followed up with, “As a juvenile?” and Herbert responded, “Yeah.” *Id.*
9 Understandably, Forrester did not pursue this topic.

10 **3. Claim Representative Forrester’s Claim Search**

11 On or about January 19, 2005, Forrester completed a claim search regarding Herbert’s auto
12 theft history and found he had three prior theft claims. *See* Forrester Decl., ¶ 12. One for a Ford
13 Escort, stolen in 1997, a Lexus, stolen in 2000, and a Lincoln Navigator, stolen in October 2002. *Id.*

14
15 Forrester then contacted Amex (American Express) Assurance, which insured the Navigator,
16 and learned the claim was settled as an unrecovered total theft, and approximately \$10,000
17 distributed to Herbert and \$18,000 to the lienholder. *Id.*, ¶ 13; *See* Decl. of Robert S. McLay in
18 Supp. of Mot. for Summ J., or alternatively, Mot. for Summ. Adjudication (“McLay Decl. ”),
19 Ex. “T” [Docket No. 69]. It was recovered in October 2002, and sold. McLay Decl., Ex. “T.”
20 Forrester contacted Allstate, which insured the Lexus and found the claim was settled as an
21 unrecovered theft, though it was later recovered with minor damage and sold. Forrester Decl., ¶ 14;
22 McLay Decl., Ex. “T.” Allstate said it paid approximately \$10,000 and \$13,000 to Herbert and the
23 lienholder, respectively. Forrester Decl., ¶ 14.

24 On January 21, 2005, Forrester sent Herbert a letter advising State Farm would verify his
25 criminal record and the Navigator’s loss history. *Id.*, Ex. “E.” On January 31, 2005, Forrester had a
26 non-recorded telephone conversation with Herbert, where he discussed the Navigator loss and a
27
28

1 second vehicle loss covered by Allstate. *Id.*, Ex. “H.” They also discussed an Alameda Superior
2 Court criminal matter in which charges were dropped. *Id.*

3 **4. Herbert’s Oral Examination**

4 **a. Herbert’s Criminal History**

5 On May 4, 2005, David McDowell, Esq., State Farm’s counsel, examined Herbert under
6 oath. McDowell Decl., ¶ 11, Ex. “M” at cover. In February 2005, prior to the examination, State
7 Farm obtained Herbert’s criminal record and learned he had pled nolo contendere in 1997 to three
8 counts of motor vehicle theft and eight other counts were dismissed. McDowell Decl., Ex. “O”;
9 Forrester Decl., ¶ 20. The criminal complaint alleged Herbert, and others, were involved in a chop-
10 shop operation. *Id.* Herbert received 16 months and did time in San Quentin. *Id.*

11 During the examination, McDowell asked Herbert if he had ever been arrested for a crime.
12 McDowell Decl., Ex. “M,” ¶ 43:26. Herbert said he had been arrested twice. *Id.*, ¶ 44. First, in
13 1992 or 1993, for drug possession, and he had pled, though he could not remember the exact plea,
14 but he received house arrest. *Id.* at 44-46. He also said he did not know if the matter was still on his
15 record. *Id.* at 45.

16 As for the second arrest, he was unsure, but believed it was in 1996 for “conspiracy or
17 possession of stolen property.” *Id.* at 47. He testified essentially he had been buying and selling
18 cars, and when he tried to register one of them with the DMV, it turned out to have been stolen. *Id.*
19 at 48. He identified the seller to authorities. *Id.* at 48-49. He could not remember his specific plea,
20 but said he did ten months in jail, in 1997. *Id.* at 49-50. He said he was trying to get the conviction
21 expunged. *Id.* at 50-51.

22 When McDowell noted discrepancies between his testimony that day, and his prior calls with
23 Forrester, Herbert said there had been a miscommunication. McDowell Decl., Ex. “O,” at 7.

24 **b. Herbert’s Vehicle Losses**

25 During the examination, McDowell also asked Herbert about his vehicle history. *Id.*,
26 Ex. “M” at 58. Herbert said he had owned several vehicles over the years, and three of them had
27
28

1 been stolen, in addition to the motorcycle. *Id.* at 63. He believed a Lexus had been stolen in either
2 1999 or 2000 and had been insured by either Farmers or Allstate. *Id.* at 64. He testified he did not
3 recall whether he had received a settlement, though he thought it might have been paid off. *Id.* at 65.
4 Herbert could not remember specifically when an Escort had been stolen, or the claim details. *Id.*
5 at 65-66. When asked, he said he did not remember receiving a settlement. *Id.* at 66. Regarding the
6 Navigator, he said he believed it had been stolen in the 2000s and it had been insured with American
7 Express. *Id.* at 67. He also testified it had been was recovered, but he could not recover it due to a
8 dispute with a towing company, but he believed he had received a settlement of \$8,000 to 12,000.
9 *Id.* at 68.

10 When asked why he did not identify these prior claims in his Affidavit, Herbert said he
11 thought it had only asked about to his motorcycle claim, and he believed State Farm knew about his
12 loss history, or the information it sought was beyond the time frame at which it was looking. *Id.*,
13 Ex. “O” at 4, 8. When asked why he had only mentioned the Navigator theft during the recorded
14 telephone conversation, Herbert said he and the claims adjuster were “in disagreements about the
15 whole nature of this whole situation and I probably just didn’t go all the way into detail.” *Id.* at 6.

16 **D. Claim Denial and Suit**

17 On June 20, 2005, McDowell recommended Sate Farm deny Herbert’s claim, based on his
18 and State Farm’s investigation, the policy’s concealment or fraud clause, and the California standard
19 for rescinding policies in the face of false claims, set by *Cummings v. Fire Insurance Exchange*, 202
20 Cal.App.3d 1407 (1988). McDowell Decl., Ex. “O.” McDowell prepared a lengthy and detailed 15-
21 page analysis. *Id.* He concluded Herbert “has made numerous misstatements, including his criminal
22 history, loss history, the sequence of events following the alleged loss, and his acquisition and
23 installation of motorcycle parts.” *Id.* at 13 para. 3. He further concluded, while individually, the
24 allege misstatements might be insufficient to support denial, collectively, they were material as they
25 pertained to “credibility, financial motive, facts of the loss and involvement in the subject loss.” *Id.*,
26 at 14 para. 4.

1 State Farm denied Herbert's claim on June July 13, 2005, and notified him why by letter.
2 See Decl. of Laura Campbell-Bishop in Supp. of Mot. for Summ. J., or in the alternative, Mot. for
3 Sum. Adjudication, ¶ 12 [Docket No. 68]. The letter stated the discrepancies between Herbert's
4 various statements amounted to material misrepresentations. *Id.* Herbert then sued State Farm, on
5 July 13, 2006, in Alameda County Superior Court, alleging two causes of action, breach of contract
6 and breach of the implied covenant of good faith and fair dealing, and requesting compensatory and
7 punitive damages, interest, and attorneys' fees. Def.'s Notice of Removal, Ex. "A," at 1, (Pl.'s
8 Compl.) [Docket No. 1]. On September 11, 2006, State Farm removed the matter to this Court.

9 LEGAL STANDARD FOR SUMMARY JUDGEMENT

10 Summary judgment is appropriate if no genuine issue of material fact exists and the moving
11 party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*,
12 477 U.S. 317, 322-23 (1986). The party moving for summary judgment must demonstrate there are
13 no genuine issues of material fact. See *Horphag v. Research Ltd. v. Garcia*, 475 F.3d 1029, 1035
14 (9th Cir. 2007). An issue is "genuine" if the evidence is such a reasonable jury could return a
15 verdict for the non-movant. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Rivera*
16 *v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). An issue is "material" if its resolution
17 could affect an action's outcome. *Anderson*, 477 U.S. at 248; *Rivera*, 395 F.3d at 1146.

18 In responding to a properly supported summary judgment motion, the non-movant cannot
19 merely rely on their pleadings, but must present specific and supported material facts, of significant
20 probative value, to preclude summary judgment. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith*
21 *Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th
22 Cir. 2002); *Federal Trade Comm'n v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001). In determining
23 whether a genuine issue of material fact exists, the Court views the evidence and draws inferences in
24 the light most favorable to the non-movant. See *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep't of*
25 *the Navy*, 365 F.3d 827, 832 (9th Cir. 2004); *Hernandez v. Hughes Missile Sys. Co.*, 362 F.3d 564,
26 568 (9th Cir. 2004). Other legal standards are addressed below, as needed.

ANALYSIS

A. Summary judgement is warranted on Herbert's first claim for breach of contract.

State Farm asserts it has no liability for Herbert's first claim because he allegedly violated his policy's concealment and fraud clause by making material misrepresentations. A concealment or fraud clause generally voids an insurance policy, when an insured attempts to deceive an insurer. *Leasure v. MSI Ins. Co.*, 65 Cal.App.4th 244, 248 (2d.Dist 1998). In California, in an insurance context, a misrepresentation, is a "false answer as to any matter of fact, material to the inquiry, knowingly and willfully made, with intent to deceive the insurer" *Cummings v. Farmers Ins. Exch.*, 202 Cal.App.3d 1407, 1416-17, 249 Cal.Rptr. 568 (1988) (quoting *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 95 (1884)).

In recommending denial, State Farm's counsel essentially noted seven categories of alleged discrepancies in the facts obtained from Herbert and third parties. McDowell Decl., Ex. "O" at 10-13. The Court need not address all seven, as one category of material misrepresentation suffices if sufficiently weighty, and as the following analysis shows, the Court finds Herbert's failure to disclose his criminal history, is adequate to end the Court's inquiry.

i. Falsity

The undisputed facts show Herbert pled nolo contest in 1997 to three counts of motor vehicle theft and eight other counts were dismissed, for which he received 16 months in prison. On January 11, 2005, when State Farm asked him if he had any felony convictions, he led it to believe his criminal records consisted only of one or more juvenile adjudications. He thus uttered a falsity. His very belated and very inaccurate additional communications, on the phone and under oath, did not correct his initial falsity, and even if all his statements are viewed in the aggregate, they still do not convey a reasonably accurate picture of his prior criminal conduct.

ii. Materiality

The materiality of a statement is not defined and determined by the effect it has on the outcome of the investigation. Rather, a question and answer are material when

1 they relate to the insured's duty to give to the insurer all the information he has as
2 well as other sources of information so that the insurer can make a determination of
3 its obligations. Thus, materiality is determined by its prospective reasonable
4 relevance to the insurer's inquiry.

5 *Cummings*, 202 Cal.App.3d at 1416-17.

6 "[I]f the misrepresentation concerns a subject reasonably relevant to the insured's
7 investigation, and if a reasonable insurer would attach importance to the fact misrepresented, then it
8 is material." *Id.* at 1417. "[M]ateriality is a mixed question of law and fact that can be decided as a
9 matter of law if reasonable minds could not disagree on the materiality of the misrepresentations."
10 *Id.*

11 Here, reasonable minds would agree an auto insurer would reasonably want to *inquire* as to a
12 auto theft claimant's criminal history, as such information is clearly relevant for investigative or
13 discovery purposes, as it could be admissible or lead to admissible evidence. *See* FED. R. CIV.
14 P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears
15 reasonably calculated to lead to the discovery of admissible evidence.") Here, Herbert's statements
16 regarding his felony auto theft convictions, were directly relevant for investigative or discovery
17 purposes, as they would have clearly lead State Farm to guide its investigation in directions it would
18 otherwise not have gone, had it not believed he had such convictions.³ In sum, Herbert's statements
19 regarding his criminal history were material.

20 **iii. Knowingly and Willfully Made, with Intent to Deceive**

21 "Generally, the issue of whether the insured's false statement was knowingly and
22 intentionally made with knowledge of its falsity and with intent of defrauding the insurer is a
23 question of fact." *Cummings*, 202 Cal.App.3d at 1417-18. In *Cummings*, an insured initially
24 claimed her home, in which she lived alone, had been vandalized by parties unknown, while she was
25

26
27 ³The Court, however, expresses no opinion as to the *admissibility* of such statements or their
28 underlying facts, in trial.

1 out, and she repeated this in an oral examination. *Id.* at 1413 fn. 3. When confronted in the
2 examination by a neighbor's account, placing her and her son, who lived with her, at home while he
3 was damaging the property, she admitted they had argued over a utility bill, during which he became
4 enraged, and drove her from the home at gun point. *Id.*

5 The *Cummings* court thus held the insured's knowledge, willfulness, and intent need not be
6 tried:

7 First, plaintiff admits that she knew she was lying to the defendant and did so with
8 the intent that defendant not find out the actual facts. Second, under *Clafin*, the
9 intent to defraud the insurer is necessarily implied when the misrepresentation is
10 material and the insured wilfully makes it with knowledge of its falsity. Thus,
11 plaintiff's intent to deceive was established as a matter of law.

12 *Cummings*, 202 Cal.App.3d at 1417-18.

13 Likewise, in *Woods v. Independent Ins. Co.*, 749 F.2d 1493 (11th Cir. 1985) the defendant
14 conveyed his insured home in fee simple to his mother, to avoid losing it in divorce, but then
15 claimed it was his when it burned down. *Id.* at 1494-95. He later conceded the knew the
16 representation was false, and the court affirmed summary judgment against him. *Id.* at 1496-97.

17 And, in *Long v. Insurance Co. of N. Am.*, 670 F.2d 930 (10th Cir. 1982), a witness saw
18 homeowners remove their furniture from their home, put in older furniture, then saw one of their
19 relatives exit the home, shortly before it caught fire. *Id.* at 931. The homeowners had moved their
20 real furniture to a storage facility, but denied under oath they had any such facility. *Id.* at 931-32.
21 The court found their denials material misrepresentations, as a matter of law. *Id.* at 933-34.

22 In this case, Herbert clearly knew he was lying, and willfully did so, in January 2005, when
23 he failed to disclose to State Farm his felony conviction and prison stay, for three counts of auto
24 theft. No reasonable jury would believe that a mere eight years after conviction, and presumably
25 only seven after imprisonment, and even less after probation,⁴ that he forgot his period of
26

27 ⁴The evidence presented does not indicate Herbert's probation term.

1 imprisonment. Nor does Herbert explain how he meant the term “Juvenile,” in his recorded
2 interview, to account for his adult narcotics conviction. In addition, Herbert did little to correct
3 these falsehoods in his second phone interview or in his oral examination. Thus, as in *Cummings*
4 and the related cases just discussed, no reasonable jury would have difficulty concluding Herbert
5 knew he was lying to State Farm and did so with the intent it not find out the actual facts. As a
6 result, Herbert’s intent to deceive is established as a matter of law.

7 **iv. Conclusion**

8 Viewing the evidence and drawing inferences in a light most favorable to Herbert, there are
9 no genuine issues of material fact which prevent the Court from finding as a matter of law in failing
10 to disclose his felony auto theft conviction and his prison term, he gave a false answer to a matter of
11 fact, material to State Farm’s inquiry, knowingly and willfully made, with the intent to deceive State
12 Farm. Therefore, the Court grants State Farm’s motion for summary judgment with regards to
13 Herbert’s first claim for breach of contract.

14 **B. Summary adjudication is warranted on Herbert’s second claim for breach of the**
15 **implied covenant of good faith and fair dealing.**

16 Summary adjudication is appropriate here, where viewing all the evidence and drawing all
17 inferences in a light most favorable to Herbert, there is no genuine issue of fact as to: (1) whether or
18 not State Farm investigated Herbert’s claim reasonably and in good faith, which it did; and
19 (2) whether, under the facts and circumstances of this matter, State Farm has a genuine dispute with
20 him regarding its liability, which it does.

21 In addition to the duties imposed on contracting parties by the express terms of their
22 agreement, the law implies in every contract a covenant of good faith and fair
23 dealing. The implied promise requires each contracting party to refrain from doing
24 anything to injure the right of the other to receive the benefits of the agreement. The
25 precise nature and extent of the duty imposed by such an implied promise will depend
26 on the contractual purposes.

1 *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 818, 169 Cal.Rptr. 691 (1979) (citations omitted).

2 “The implied covenant of good faith and fair dealing does not impute an obligation on the
3 insurer to pay every claim made by its insured.” *Wilson v. 21st Century Ins. Co.*, 42 Cal.4th 713,
4 721 (2007). But when “the insurer unreasonably and in bad faith withholds payment of the claim of
5 its insured, it is subject to liability in tort.” *Id.* at 720 (quoting *Frommoethelydo v. Fire Ins. Exch.*
6 42 Cal.3d 208, 214-215, 228 Cal.Rptr. 160, 721 P.2d 41 (1986)). To avoid this, an insurer must
7 fully investigate a claim’s grounds for denial and approval. *Wilson*, 42 Cal.4th at 721. Likewise, an
8 insurer must not deny a claim on grounds unfounded or contradicted by known facts. *Id.*

9 “[T]he critical issue [is] the reasonableness of the insurer’s conduct under the facts of the
10 particular case.... An insurer’s good or bad faith must be evaluated in light of the totality of the
11 circumstances surrounding its actions.” *Wilson*, 42 Cal.4th at 723. Under the “genuine dispute”
12 rule:

13 [A]n insurer denying or delaying the payment of policy benefits due to the existence
14 of a genuine dispute with its insured as to the existence of coverage liability or the
15 amount of the insured’s coverage claim is not liable in bad faith even though it might
16 be liable for breach of contract.

17 *Id.* at 723 (quoting *Chateau Chamberay Homeowners Assn. v. Associated Int’l. Ins. Co.*, 90
18 Cal.App.4th 335, 347, 108 Cal.Rptr.2d 776 (2001)).

19 The genuine issue rule in the context of bad faith claims allows a [trial] court to grant
20 summary judgment when it is undisputed or indisputable that the basis for the
21 insurer’s denial of benefits was reasonable—for example, where even under the
22 plaintiff’s version of the facts there is a genuine issue as to the insurer’s liability
23 under California law. [Citation.] ... On the other hand, an insurer is not entitled to
24 judgment as a matter of law where, viewing the facts in the light most favorable to
25 the plaintiff, a jury could conclude that the insurer acted unreasonably.

26 *Wilson*, 42 Cal.4th at 724 (quoting *Amadeo v. Principal Mut. Life Ins. Co.* (9th Cir. 2002) 290 F.3d
27
28

1 1152, 1161-1162).

2 In this case, it is clear, as a matter of law, State Farm did not breach the implied covenant of
3 good faith and fair dealing. There is nothing in State Farm's conduct which suggests its
4 investigation was unreasonable or performed in bad faith. State Farm looked into the facts
5 surrounding Herbert's claim, his loss history, his criminal background, and the motorcycle's value.
6 The latter investigation covered Herbert's appraisals, his work done on the vehicle, and his alleged
7 customized equipment.⁵ As discussed in analyzing Herbert's first claim for breach of contract, all of
8 these subjects are material to a claims investigation.

9 Procedurally, it is also clear as a matter of law that State Farm behaved reasonably and in
10 good faith in conducting its investigation. It used the Affidavit, telephone interviews, and an oral
11 examination under oath, and third-party statements and documents to verify Herbert's statements.
12 And, State Farm took pains to advise him as to what it was doing and with whom it was
13 communicating. While Herbert might complain State Farm was investigating him, rather than his
14 claim, Herbert Decl. ¶ 16, State Farm was as much ruling him out, as ruling him in.

15 Also, Herbert was slow to respond to inquiries, and often gave inconsistent or partial
16 answers, which created contradictions or raised questions into which State Farm had a right to
17 follow up. In addition, based on all the inconsistencies State Farm found, it was reasonable for them
18 to conclude Herbert had defrauded State Farm.⁶ Thus, this is not a case where State Farm failed to
19

20 ⁵ In particular, Herbert provided a box of receipts, which State Farm sent to an appraiser for
21 evaluation. Forrester Decl. ¶ 16, Exs. "E," "H"- "I," "K"; McDowell Decl., Ex. "O" at 3. State
22 Farm also contacted some of the entities indicated in the receipts to verify whether the work
23 indicated had been done. McDowell Decl., Ex. "M" at 218-21, 247-48, "O" at 4-5; McLay Decl.,
24 Ex. "U." Also, although Herbert claimed to have had the motorcycle appraised twice, Forrester Decl.
25 ¶ 16; McDowell Decl., Ex. "O" at 7, he never produced any written appraisals, nor provided contact
information for the appraisers. State Farm also requested cell phone records and his Le Cheval
receipt. Forrester Decl. Exs. "E," "H"- "I." Herbert refused to produce the former, on the grounds
State Farm wanted them for multiple days before and after the date of loss, Herbert Decl. ¶ 17, and
he never produced the latter, McDowell Decl., Ex. "O" at 20 ¶ 5.

26 ⁶ This is not to suggest the evidence supports finding Herbert *defrauded* State Farm, *as a*
27 *matter of law*. Both Herbert and State Farm could reasonably dispute his denial, without either
violating the implied covenant of good faith and fair dealing, even if State Farm were in breach of
contract. *See Wilson* 42 Cal.4th at 723.

1 follow up on a reasonable lead or ignored contradictory evidence. *See Frommoethelydo*, 42
2 Cal.App.3d at 212-14, 220 (insurer's denial unreasonable where insured claimed loss of similar sets
3 of audio-visual equipment twice, due to two burglaries, and insurer failed to interview known
4 witness who had seen equipment in the insured's home, between burglaries).

5 In addition, State Farm consulted with legal counsel, not only to conduct the oral
6 examination, but to rigorously analyze the evidence discovered, under the pertinent California legal
7 standards, to reasonably dispose of his claim. The use of counsel tends to support State Farm acted
8 in good faith. *See State Farm Mut. Auto. Ins. Co. v. Superior Ct.*, 228 Cal.App.3d 721, 725, 279
9 Cal.Rptr. 116 (1991).

10 Thus, under the undisputed facts and circumstances of this matter, viewed with all inferences
11 drawn in a light most favorable to Herbert, State Farm has a genuine dispute with him regarding its
12 liability, and any reasonable jury would find it investigated Herbert's claim reasonably and in good
13 faith. Thus, summary adjudication is appropriate on Herbert's second claim for breach of the
14 implied covenant of good faith and fair dealing.

15 **C. Summary adjudication is appropriate on Herbert's claim for punitive damages.**

16 Because State Farm is entitled to summary adjudication on Herbert's second claim for breach
17 of the covenant of good faith and fair dealing, it is also entitled to summary adjudication on
18 Herbert's claim for punitive damages. Under California law:

19 In an action for the breach of an obligation not arising from contract, where it is
20 proven by clear and convincing evidence that the defendant has been guilty of
21 oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may
22 recover damages for the sake of example and by way of punishing the defendant.
23 Cal. Civ. Code § 3294(c).

24 Evidence that an insurer has violated its duty of good faith and fair dealing
25 does not thereby establish that it has acted with the requisite malice, oppression or
26 fraud to justify an award of punitive damages. In order to establish that an insurer's
27
28

1 conduct has gone sufficiently beyond mere bad faith to warrant a punitive award, it
2 must be shown by *clear and convincing evidence* that the insurer has acted
3 maliciously, oppressively or fraudulently.

4 *Mock v. Michigan Millers Mut. Ins. Co.*, 4 Cal.App.4th 306, 327, 5 Cal.Rptr.2d 594 (1992) (citations
5 omitted) (emphasis in original).

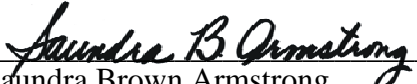
6 In this case, as already discussed, State Farm is entitled to summary adjudication on
7 Herbert's second claim for breach of the covenant of good faith and fair dealing. Thus, as this is
8 Herbert's only claim which might allow for punitive damages, State Farm, as a matter of law, under
9 *Mock's* analysis, could not have engaged in malicious, oppressive, or fraudulent conduct. Therefore,
10 State Farm is entitled to summary adjudication on Herbert's claim for punitive damages.

11 **CONCLUSION**

12 The Court GRANTS State Farm's Motion for Summary Judgment or in the alternative, Motion
13 for Summary Adjudication [Docket No. 63].

14 IT IS SO ORDERED.

15 February 14, 2008

16 
17 Sandra Brown Armstrong
18 United States District Judge
19
20
21
22
23
24
25
26
27
28